Daniel T. Pascucci, Esq. (SBN 166780)
dpascucci@mintz.com
Nathan R. Hamler, Esq. (SBN 227765)
nhamler@mintz.com
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC
3580 Carmel Mountain Road, Suite 300
San Diego, California 92130
Telephone: (858) 314-1500
Facsimile: (858) 314-1501

Mark B. Mizrahi, Esq. (SBN 179384)
mmizrahi@bjtlaw.com
BELASCO JACOBS & TOWNSLEY, LLP
6100 Center Drive, Suite 630
Los Angeles, California 90045
Telephone: (310) 743-1188
Facsimile: (310)743-1189

Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	Case No. 08-cv-1166 IEG (POR) **ANSWER AND AFFIRMATIVE DEFENSES** **[JURY TRIAL DEMANDED]** Courtroom.: 1, Fourth Floor Judge: Irma E. Gonzalez Date Filed: 07/01/08

PREAMBLE

This case involves a seller of energy drinks who, instead of allowing its products to speak for themselves in the marketplace, resorted to false advertising and trade libel in order to try to boost its own position and diminish Hansen's. The Lanham Act and California law provide Hansen with remedies for the false advertising and trade libel that has harmed its commercial interests.

///

Answer:

Denied.

PARTIES

Plaintiffs.

1. Hansen Beverage Company is a Delaware corporation, licensed to do business in California, with its principal place of business in Corona, California.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

2. Since 1992, Hansen has developed, marketed, sold and distributed non-alcoholic beverages such as sodas, fruit juices, energy and sports drinks, smoothies, lemonades, and iced teas.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

3. Innovation Ventures, LLC dba Living Essentials is, Hansen is informed and believes, a Michigan corporation with its principal place of business in Novi, Michigan. Living Essentials conducts business in this district.

Answer:

Defendant admits that it is a Michigan limited liability company with its principal place of business in Novi, Michigan. Defendant cannot possibly know as to what Hansen is informed and believes, and therefore denies the remaining allegations of this paragraph.

4. Living Essentials commercially advertises and markets in interstate commerce competing energy drinks, each of which it publicly claims and represents, *inter alia*, produces five hours of energy.

Answer:

Defendant admits that it advertises and markets a product under the trademark 5-HOUR *ENERGY*®. All other allegations in paragraph 4 are denied.

///

JURISDICTION

5. Because this civil action arises under the Lanham Act, 15 U.S.C. §§ 1051, *et seq.*, and specifically 15 U.S.C. § 1125(a)(1)(B), this Court has jurisdiction pursuant to 15 U.S.C. § 1121, 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a).

Answer:

Admitted.

6. This Court has subject matter jurisdiction pursuant to the provisions of 28 U.S.C. § 1332(a)(1) in that it is a civil action between citizens of different states, namely, California and Delaware and Michigan, and the amount in controversy exceeds $75,000, exclusive of interest and costs.

Answer:

Defendant admits that the parties to this civil action are citizens of different states. Defendant denies the remaining allegations of paragraph 6.

7. Finally, this Court has subject matter jurisdiction over Hansen's California unfair competition and false advertising claims pursuant to 28 U.S.C. § 1338(b), in that these claims are joined with a substantial related claim under the Lanham Act and this Court also has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367(a).

Answer:

Denied.

VENUE

8. Venue in this district is proper pursuant to the provisions of 28 U.S.C. § 1391(b).

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

///

///

///

///

MATERIAL ALLEGATIONS

HANSEN

9. Hansen's energy drinks have been extremely successful and are sold throughout the United States by more than 100,000 retail stores, including convenience stores, gas stations, supermarkets, club stores, drug stores and warehouse stores.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

10. In 1997 Hansen introduced Hansen's® Energy Drinks.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

11. Then, in April 2002, Hansen released the first of its popular Monster Energy® drinks. The line of Monster Energy® drinks has since grown to include the Lo-Carb Monster, Monster Khaos, Monster Assault, Monster M-80, Monster Heavy Metal, Monster Mixxd energy drinks, which also use the Monster and Monster Energy® trademarks and similar trade dresses.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

12. In 2004, Hansen introduced Lost® Energy™ Drinks and Rumba™. In 2005, Hansen introduced Joker Mad Energy™ drinks, a low-carb version of Lost® Five-O™ energy drink.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

13. In 2006 Hansen introduced Ace™ Energy drinks and Unbound Energy® drinks.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

14. Hansen's energy drinks have achieved significant success in commerce throughout the United States and are favored energy drinks for millions of customers.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

LIVING ESSENTIALS

15. Living Essentials' 5-HOUR *ENERGY*® drinks are competing energy-drink products that Living Essentials markets and sells in interstate commerce throughout the United States.

Answer:

Defendant admits that it markets and sells a liquid supplement under the trademark 5-HOUR *ENERGY*® throughout the United States. All other allegations of paragraph 15 are denied.

16. Living Essentials advertises its 5-HOUR *ENERGY*® drinks in commercial advertising across the United States.

Answer:

Defendant admits that it advertises a liquid supplement under the trademark 5-HOUR *ENERGY*® across the United States. All other allegations of paragraph 16 are denied.

17. Rather than engage in fair competition in the marketplace, however, and allow consumers to exercise their own choice, Living Essentials has resorted to false advertising and trade libel to attempt to promote its 5-HOUR *ENERGY*® drinks and falsely to discourage customers from using or purchasing Hansen's energy drinks.

Answer:

Denied.

THE FALSE ADVERTISING CLAIMS

18. Indeed, the name "5-HOUR *ENERGY*®" is, in and of itself, false and misleading precisely because it states, or at a minimum implies, that two ounces of a 5-HOUR *ENERGY*® drink produces a sustained level of "energy" for five hours. This is untruthful based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology.

///

Answer:

Denied.

19. One 5-HOUR *ENERGY*® commercial states:

> Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. But with 5-Hour Energy you could sail through your day with no jitters or crash. It contains B Vitamins for energy and amino acids for focus, zero sugar and only 8 calories. Drink it in seconds and in minutes you're feeling alert and productive and that feeling lasts for hours. 5-Hour Energy. Hours of energy now. No crash later. Available at these fine stores.

Answer:

Living Essentials admits that the words reproduced bear resemblance to its advertisements. Living Essentials denies all other allegations.

20. Living Essentials' claim that "with 5-HOUR *ENERGY*® you could sail through your day with no jitters or crash" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, a false and misleading statement of material fact about 5-HOUR *ENERGY*®.

Answer:

Denied.

21. Living Essentials' claim that 5-HOUR *ENERGY*® "contains B Vitamins for energy and amino acids for focus" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

22. Living Essentials' claim that with 5-HOUR ENERGY® one can "drink it in seconds and in minutes you're feeling alert and productive and that feeling lasts for hours" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

23. Living Essentials' claim in this as well as additional advertisements that 5HOUR ENERGY™ provides "Hours of energy now. No crash later" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

24. Another 5-HOUR *ENERGY*® commercial states:

> Why are energy drinks bad? 12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk. Good for a short jittery burst, then a dehabilitating crash. So don't drink energy drinks, drink 5-Hour Energy. It's not a drink, more like a sip. Well with that sip you'll feel alert and focused for hours, without the crash or jitters. It has zero sugar, only 4 calories and no guarana.5-Hour Energy. Hours of energy now. No crash later.

Answer:

Living Essentials admits that the words reproduced bear resemblance to its advertisements. Living Essentials denies all other allegations.

25. Living Essentials' claim in this as well as additional advertisements that "you'll feel alert and focused for hours without the crash or jitters" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

26. Living Essentials' claim in this as well as additional advertisements that 5-HOUR *ENERGY*® provides "Hours of energy now. No crash later" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

27. And another advertisement claims:

> This is you after an energy drink. Unfortunately, so is this. Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. That's why you should try a new liquid energy shot called 5 Hour Energy. With 5 Hour Energy, you can leave grogginess behind and sail through your day without feeling jittery,

> tense or, you know. That's because 5-Hour Energy contains a powerful blend of B Vitamins for energy and amino acids for focus, alertness and better mood. There is zero sugar, about as much caffeine as a cup of coffee and only 4 calories. The 2-ounce shot takes just seconds to drink and in minutes you're feeling bright, awake and productive and that feeling lasts for hours. So if your energy drink makes you crash, switch to 5 Hour Energy. Hours of energy now, no crash later. Find out if 5 Hour Energy is right for you. It's available at these fine stores, or for more information go to 5hourenergy.com.

Answer:

Living Essentials admits that the words reproduced bear resemblance to its advertisements. Living Essentials denies all other allegations.

28. Living Essentials' claims in this as well as additional advertisements that 5-HOUR *ENERGY*® provides "Hours of energy now. No crash later" are, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

29. Living Essentials' claim in this as well as additional advertisements that "with 5-HOUR *ENERGY*® you can leave grogginess behind and still do your day without feeling jittery and tense or, you know" is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

30. Living Essentials' claim in this as well as additional advertisements that "5-HOUR *ENERGY*® contains a powerful blend of B Vitamins for energy and amino acids for focus, alertness and better mood," is, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, false and misleading.

Answer:

Denied.

///

31. In addition, 5-HOUR *ENERGY*® conspicuously makes the following claims on each drink's container:

- "Hours of energy now"
- "No crash later"
- "Feel it in minutes ● Lasts for hours"
- "Sugar free"
- "0 net carbs"

Answer:

Defendant admits that the quoted phrases are written on each container of 5-HOUR *ENERGY*®. Defendant denies the remaining allegations of paragraph 31.

32. 5-HOUR *ENERGY*® Decaf conspicuously makes the following claims on each drink's container:

- "Hours of energy now"
- "No crash later"
- "Feel it in minutes ● Lasts for hours"
- "Sugar free"
- "Decaf"
- "Only 4 calories"

Answer:

Defendant admits that the quoted phrases are written on each container of 5-HOUR *ENERGY*® Decaf. Defendant denies the remaining allegations of paragraph 32.

33. 35-HOUR *ENERGY*® EXTRA STRENGTH conspicuously makes the following claims on each drink's container:

- "Sugar free"
- "Only 4 calories"

Answer:

Defendant admits that the quoted phrases are written on each container of 5-HOUR *ENERGY*® EXTRA STRENGTH. Defendant denies the remaining allegations of paragraph 33.

34. Living Essentials' claims in the quoted advertisements and/or on the product containers that 5-HOUR *ENERGY*® products provide "hours of energy now," or "sail through your day with no jitters or crash," or "in minutes you're feeling alert and productive and that feeling lasts

for hours 5-Hour Energy," or "Hours of energy now. No crash later," or 'Feel it in minutes lasts for hours" are, based on 5-HOUR *ENERGY*®'s ingredients, at least as disclosed on the applicable product container labels, false and misleading based on generally accepted principles of biochemistry, pharmacology and physiology and cannot and do not produce the effects claimed.

Answer:

Denied.

35. Living Essentials' claims in advertisements that its 5-HOUR *ENERGY*® products make the drinker "feel alert and focused for hours, without the crash or jitters" are, based on the products' ingredients, at least as disclosed on the applicable product container labels, false and misleading based on generally accepted principles of biochemistry, pharmacology and physiology and cannot and do not produce the effects claimed.

Answer:

Denied.

36. 5-HOUR *ENERGY*® Decaf's ingredients, at least as disclosed — "sugar free," "Decaf," "6 mg. Of caffeine," "only 4 calories" — given generally accepted principles of biochemistry, pharmacology and physiology and cannot and do not provide "Hours of energy now," "Feel it in minutes ● Lasts for hours," "No crash later," as Living Essentials claims. Those claims are further false and misleading based on the products' ingredients including, in particular, the limited amount of caffeine and sugar in the products, at least as disclosed on the applicable container labels.

Answer:

Denied.

37. 5-HOUR *ENERGY*® Extra Strength's claims, described in paragraphs 18-30 and 33 above, including its claim derived from the name of the product itself, are false and misleading based on the product's claims to be "sugar free" and "only 4 calories" and the product's other ingredients at least as disclosed on the applicable container labels, given generally accepted principles of biochemistry, pharmacology and physiology.

///

Answer:

Denied.

The Trade Libel

38. Living Essentials' statements that energy drinks contain "12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk." falsely disparages energy drinks in general that contain some or all the ingredients to which Living Essentials refers, because such statements falsely impute adverse characteristics to and consequences of such ingredients. Such statements constitute a trade libel of and/or against energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

Answer:

Denied.

39. Living Essentials' statements that energy drinks are "good for short jittery bursts, then a dehabilitating crash" are false and misleading statements, and by clear reference and/or inference falsely disparage energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

Answer:

Denied.

40. Living Essentials' statement "why do energy drinks make you crash" is false and misleading and constitutes trade libel in that by clear reference and/or by inference it falsely disparages energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

Answer:

Denied.

41. Living Essentials' statements, "One minute you're wired up. The next you feel worse than before" are false and misleading and constitute trade libel in that, by clear reference and/or inference they falsely disparage energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks. Such statements suggest that energy drinks in general, including Hansen's energy drinks, contain large amounts of sugar and caffeine which

produce results that 5-HOUR *ENERGY*® drinks contain even higher levels of caffeine than Hansen's energy drinks. Such claims about Hansen's energy drinks. Such claims about Hansen's energy drinks are in any event false and misleading.

Answer:

Denied.

42. Living Essentials' statement, "the answer is large amounts of sugar and caffeine" is false and misleading and constitutes trade libel in that it falsely disparages energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

Answer:

Denied.

43. Living Essentials' statement that "with 5-HOUR *ENERGY*® you can leave grogginess behind and still do your day without feeling jittery and tense or, you know" is false and misleading and constitutes trade libel in that it falsely disparages energy drinks in general, including Hansen's energy drinks which fall within the class of drinks known as energy drinks.

Answer:

Denied.

44. The statements quoted above are false and misleading statements of material fact about Living Essentials' own products and also, by clear inference, about Hansen's energy drinks, such that they are likely to influence the purchasing decisions of a substantial number of reasonable consumers and actually deceive or have the tendency to deceive a substantial segment of the reasonable consumer audience.

Answer:

Denied.

45. All such statements constitute false advertising that Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and also California's unfair competition law, Business & Professions Code §§ 17200 and 17500, prohibit.

Answer:

Denied.

46. Worse, the effect such advertising has, and will have, on reasonable consumers makes Living Essentials' false claims about itself and its false statements about Hansen energy drinks even more pernicious.

Answer:

Denied.

FIRST CLAIM FOR RELIEF

[FALSE ADVERTISING – VIOLATION OF 15 U.S.C. § 1125(a)]

47. Hansen incorporates by this reference paragraphs 1 through 46, above.

Answer:

48. Defendant incorporates by reference its responses to paragraphs 1-46 as if fully set forth herein.

49. Hansen sells beverages in interstate commerce throughout the United States.

Answer:

Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations of this paragraph, and therefore denies the same.

50. Living Essentials sells its 5-HOUR *ENERGY*® products in interstate commerce throughout the United States and it competes with Hansen's energy drinks.

Answer:

Defendant admits that it sells its 5-HOUR *ENERGY*® products to distributors in various parts of the United States. Defendant denies the remaining allegation of paragraph 49.

51. Living Essentials engages in commercial advertising in interstate commerce across the United States.

Answer:

Admitted.

52. Living Essentials' advertisements contain false and misleading statements of fact concerning its own products.

Answer:

Denied.

53. In addition, Living Essentials' advertisements contain false and misleading statements of fact that the reasonable consumer would readily impute, and/or is likely readily to impute, to energy drinks in general and to Hansen's energy drinks in particular.

Answer:

Denied.

54. Living Essentials' false and misleading commercial advertising in interstate commerce violates Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), in that: it contains false and misleading statements of fact in commercial advertising about its own products and about Hansen's products; those representations are material; they are likely to influence the purchasing decision of a substantial number of reasonable consumers; those misrepresentations actually deceive or, at a minimum, have the tendency to deceive a substantial segment of the reasonable consumer audience; and, Hansen has been injured, and in the future is likely to continue to be injured, as a result of the misrepresentations, both by the direct diversion of sales from Hansen to Living Essentials and by a lessening of the goodwill associated with Hansen's products.

Answer:

Denied.

55. As a direct and proximate result, Hansen has suffered injury and harm and will continue to suffer such harm, including money damages in excess of $75,000, exclusive of interest and costs, the exact amount of which Hansen will prove at trial.

Answer:

Denied.

56. Hansen is informed and believes that Living Essentials’ false and misleading advertising is willful.

Answer:

Denied.

57. Hansen has no adequate remedy at law with respect to Living Essentials’ future false and misleading commercial advertising precisely because Hansen is informed and believes that

Living Essentials will continue in its same course of conduct unless and until it has been restrained by an order of this Court.

Answer:

Denied.

SECOND CLAIM FOR RELIEF

[FALSE ADVERTISING - CALIFORNIA LAW]

58. Hansen incorporates by this reference paragraphs 1 through 57, above.

Answer:

Defendant incorporates by reference its responses to paragraphs 1-56 as if fully set forth herein.

59. Living Essentials' conduct, as alleged above, violates the misbranding provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 343 and 350, which make the false or misleading labeling of, *inter alia,* dietary and vitamin supplements unlawful and illegal.

Answer:

Denied.

60. In addition, Living Essentials' conduct, as alleged above, violates § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), in that it constitutes an unfair method of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce.

Answer:

Denied.

61. Living Essentials' conduct, as alleged above, constitutes false advertising and unfair competition pursuant to the provisions of Business & Professions Code §§ 17200 and17500.

Answer:

Denied.

62. As a direct and proximate result, Hansen has suffered injury and harm and will continue to suffer injury and harm both by the direct diversion of sales from Hansen to Living Essentials and by a lessening of the goodwill associated with Hansen's products.

///

Answer:

Denied.

63. Hansen has no adequate remedy at law with respect to Living Essentials' future false and misleading commercial advertising precisely because Hansen is informed and believes that Living Essentials will continue in its same course of conduct unless and until it has been restrained by an order of this Court.

Answer:

Denied.

THIRD CLAIM FOR RELIEF

[TRADE LIBEL]

64. Hansen incorporates by this reference paragraphs 1 through 63, above.

Answer:

Defendant incorporates by reference its responses to paragraphs 1-62 as if fully set forth herein.

65. By virtue of all of Living Essentials' false and misleading statements as set forth above, and by singling out Hansen's energy drinks by their well-known ingredients, Living Essentials' has engaged in the intentional disparagement of the quality of energy drinks in general and of Hansen's energy drinks in particular, resulting in the money damages that Hansen's has suffered.

Answer:

Denied.

66. As a direct and proximate result of all of Living Essentials' false and misleading statements as set forth above and also as a direct and proximate result of Living Essentials' trade libel and intentional disparagement of the quality of energy drinks in general and of Hansen's energy drinks in particular, Hansen has suffered money damages in an amount not presently known, but in excess of $75,000, exclusive of interests and costs, and which will be proved at trial.

Answer:

Denied.

///

67. Living Essentials' conduct constitutes an intentional misrepresentation and false, defamatory statements, all with the intention of causing injury to Hansen and is oppressive, fraudulent and malicious conduct as defined in California Civil Code § 3294. Hansen should recover, in addition to its actual damages, exemplary and punitive damages according to proof.

Answer:

Denied.

AFFIRMATIVE DEFENSES

For its affirmative defenses to the Complaint, defendant asserts the following:

1. The Complaint fails to state a claim upon which relief may be granted.

2. Plaintiff's state law claim is preempted by the Federal Food, Drug & Cosmetic Act and the Federal Trade Commission Act.

3. Defendant's advertisements were either accurate, or at the most puffery, and not likely to mislead or deceive any consumers.

4. Plaintiff is not entitled to injunctive relief because any alleged injury to plaintiff is not immediate or irreparable, and plaintiff has an adequate remedy at law.

5. Plaintiff is barred from any relief sought in the Complaint because of the doctrines of laches, waiver, acquiescence and/or equitable estoppel.

6. Plaintiff is barred from any relief sought in the Complaint because of unclean hands.

7. Venue is improper in this district.

8. Defendant reserves any affirmative defenses available to it now existing, or later arising, as may be discovered.

///

///

///

///

///

///

///

PRAYER FOR RELIEF

WHEREFORE, Defendant demands entry of judgment in favor of defendant on all counts in the Complaint, awarding defendant its costs and expenses, including attorney fees, in defending this matter; and awarding defendant such other and further relief as this Court deems just.

Dated: August 18, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

By *s/Nathan Hamler*
Nathan R. Hamler, Esq.

Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

Mark A. Cantor (MI Bar No. P32661)
Pro Hac Vice Application Anticipated
Marc Lorelli (MI Bar No. P63156)
Pro Hac Vice Application Anticipated
Thomas W. Cunningham (MI Bar No. P57899)
Pro Hac Vice Application Anticipated
BROOKS KUSHMAN P.C.
1000 Town Center, Twenty-Second Floor
Southfield, MI 48075-1238
Telephone: (248) 358-4400
Facsimile: (248) 358-3351

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 18, 2008, I filed a copy of the following document(s):

ANSWER AND AFFIRMATIVE DEFENSES

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq. Edward J. McIntyre, Esq. Alison L. Pivonka, Esq. **SOLOMON WARD SEIDENWURM & SMITH** 401 B Street, Suite 1200 San Diego, CA 92101 (619) 231-0303	Attorneys for Plaintiff HANSEN BEVERAGE COMPANY nsmith@swsslaw.com emcintyre@swsslaw.com apivonka@swsslaw.com

Executed on August 18, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

4407471v.1